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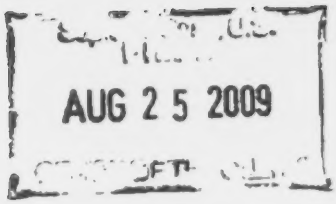

No. 08-1396

IN THE

Supreme Court of the United States

THE COFFEE BEANERY, LTD., ET AL.,

Petitioners,

v.

WW, LLC, RICHARD WELSHANS, AND DEBORAH WILLIAMS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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August 2009

QUESTION PRESENTED

1. Under the Federal Arbitration Act, courts may vacate arbitration awards when arbitrators have "exceeded their powers." 9 U.S.C. § 10(a)(4). Every circuit to squarely address the issue has held that arbitrators may exceed their powers under Section 10(a)(4) by manifestly disregarding the law, and no circuit has foreclosed that manifest-disregard standard. In the absence of a circuit split, should this Court grant certiorari to decide whether the manifest-disregard standard is consistent with Section 10(a)(4)?

2. Should the Court grant certiorari to decide whether, assuming the manifest-disregard standard is consistent with Section 10(a)(4), the decision below misapplied that standard to the facts of this case?

DISCLOSURE STATEMENT

WW, LLC has no parent corporations, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

For half a century, federal courts have held that arbitration awards may be set aside in the rare event that an arbitrator manifestly disregards the law. This extremely limited and deferential standard—adopted by every federal circuit—has historically been viewed as an application of Section 10(a)(4) of the Federal Arbitration Act (FAA), because manifest disregard of the law is, by definition, one way in which arbitrators can "exceed[] their powers." 9 U.S.C. § 10(a)(4).

Coffee Beanery wants this Court to jettison that half-century of jurisprudence. It urges the Court to grant certiorari to resolve a purported circuit split over "whether manifest disregard of the law survives *in any form* as a ground for vacating arbitration awards under the FAA." Pet. 3 (emphasis added). The split, the petition contends, has developed since this Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. ___, 128 S. Ct. 1396, 1403 (2008), which held that Section 10 "provide[s] the FAA's exclusive grounds for expedited vacatur."

There is no circuit split. In the 16 months since *Hall Street*, not one circuit has held that the manifest-disregard standard does not survive in any form. No circuit, in other words, follows the approach that Coffee Beanery advocates. On the contrary, the only two circuits to have squarely decided the issue since *Hall Street*—the Second and the Ninth—have held that the manifest-disregard standard remains valid as an application of section 10(a)(4). These courts have taken their cue from *Hall Street* itself, which acknowledged (in a passage the petition conspicuously omits) that manifest disregard may be viewed as "shorthand" for section 10(a)(4). 128 S. Ct. at 1404. Reviewing for manifest dis-

regard as a gloss on section 10(a)(4) is also consistent with pre-*Hall Street* precedent from the Seventh and Ninth Circuits describing manifest disregard as falling comfortably within section 10(a)(4).

No circuit has rejected the approach of the Second, Seventh, and Ninth Circuits. Coffee Beanery's claim of a circuit split rests on the assertion that two circuits—the First and the Fifth—have foreclosed the manifest-disregard standard altogether. But that assertion is incorrect. The First Circuit decision cited in the petition expressly declined to reach that question, and a subsequent First Circuit decision (not mentioned in the petition) in fact reviewed an arbitration award for manifest disregard. Nor has the Fifth Circuit created a split. The Fifth Circuit's careful and narrow decision holds only that manifest disregard is unavailable to the extent that it constitutes an independent, *nonstatutory* ground for vacatur, and leaves for another day the question whether manifest-disregard survives as a gloss on section 10(a)(4). That approach is entirely consistent with the approach of the Second, Seventh, and Ninth Circuits—as the Fifth Circuit itself acknowledged. Finally, the petition mischaracterizes the law of the Fourth and Sixth Circuits, neither of which has produced any published post-*Hall Street* precedent on the question presented.

Absent a split on the first question presented, the petition boils down to a case-specific plea for error correction. But an alleged "misapplication of a properly stated rule of law" is generally not an appropriate ground for certiorari. S. Ct. Rule 10.

STATEMENT

1. Factual Background. After Richard Welshans left his job at a chemical manufacturer in 2003, he and his wife, Deborah Williams, decided to use his severance

package to open a coffee shop in their hometown of Annapolis, Maryland. They arranged to meet with representatives of The Coffee Beanery, a company whose primary business is selling coffee shop franchises. App. 2, 30.[1]

Richard and Deborah attended a "discovery day" for potential franchisees at Coffee Beanery's Michigan headquarters, where they met with the company's vice president, Kevin Shaw. Although the couple went to the meeting interested in a traditional coffee shop franchise, Shaw persuaded them to purchase a full-scale "Café Store," which was far more expensive to open and operate, but which he claimed would be more lucrative. Shaw asked the couple, "Can you get by on $125,000?" and showed them optimistic income projections. App. 3. That same day, they entered into a contract to purchase and operate a Café Store franchise for an initial franchise fee of $25,000. The contract included a mandatory binding arbitration clause.

Coffee Beanery hid from Richard and Deborah the fact that its sales pitch made the café franchises look much more profitable than they actually were. Most of the café shops closed within three years, leaving their owners deep in debt. By the time Richard and Deborah agreed to buy their franchise, approximately 40 café franchises had failed. About 60 more have failed since. The company also concealed the fact that Shaw had been convicted of a felony (grand larceny)—despite a Maryland Franchise Act provision requiring disclosure to

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[1] *See* Stephanie Mencimer, *Franchise Fraud: Wake Up and Smell the Fine Print*, Mother Jones, Feb. 24, 2009, *available at* http://www.motherjones.com/politics/2009/02/franchise-fraud-wake-and-smell-fine-print (detailing Richard and Deborah's experience with Coffee Beanery).

franchisees of felony convictions for "misappropriation of property." Md. Bus. Reg. Code Ann. § 14-216(8)(i).

Richard and Deborah were likewise unaware that Coffee Beanery had experienced serious financial difficulties, and that its business relied on selling franchises and equipment to franchisees at inflated prices. For example, Coffee Beanery required the couple to buy from the company a discontinued lighting system for about $14,000, and a defective display case for $8,000. By 2004, they had been forced to invest approximately $90,000 in personal funds, $300,000 from a Small Business Administration loan, and $40,000 from a home equity loan—just to keep the business afloat. As a result of their experience with Coffee Beanery, Richard and Deborah were eventually forced to mortgage their home and file for bankruptcy.

2. **State Enforcement Action.** In January 2006, in response to Richard and Deborah's case, the Maryland Securities Commissioner issued an administrative order to show cause against the Coffee Beanery and Kevin Shaw, alleging that they had violated the disclosure and anti-fraud provisions of the Maryland Franchise Act. App. 4-5. The Commissioner's claims were nearly identical to those that Richard and Deborah independently brought in this case—that Coffee Beanery had made numerous material misrepresentations in connection with the offer and sale of the Café Store franchises, that Shaw improperly told buyers they could expect a specific income level from the operation of a Café Store, and that Coffee Beanery had failed to timely provide certain required disclosures. *Id.* 5.

In September 2006, the Commissioner, Coffee Beanery, and Shaw entered into a consent order, whereby Coffee Beanery and Shaw acknowledged that

"Coffee Beanery violated . . . the Maryland Franchise Act by making material misrepresentations of fact or omissions of material fact" to prospective Maryland franchisees, and by failing to make required disclosures. *Id.* 34-35. The order required Coffee Beanery and Shaw to cease selling franchises in Maryland unless they complied with the Franchise Act's disclosure requirements and to offer recission to franchisees. *Id.*

3. District-Court and Arbitration Proceedings. One month before the Securities Commissioner's order to show cause, Richard, Deborah, and WW, LLC (the corporation they had formed to run the café) sued Coffee Beanery in federal district court in Maryland. App. 4. In response, Coffee Beanery filed a petition to compel arbitration in federal district court in Michigan. *Id.* 5. The latter court granted the petition and Coffee Beanery commenced arbitration. The Maryland case was stayed pending the outcome of the arbitration.

The arbitrator selected by Coffee Beanery, JoAnne Barron, shared an accountant with Coffee Beanery—a critical conflict of interest given the centrality of Coffee Beanery's accounting to the dispute. Although this conflict was disclosed to the arbitral forum, it was not disclosed to Richard and Deborah until after Barron's appointment. The couple asked that Barron be replaced because "financial disclosures by Coffee Beanery are at issue in this case," but Barron was not removed.

Despite the Securities Commissioner's conclusions, the arbitrator ruled against Richard and Deborah in all respects and found no violations of the Franchise Act. *Id.* 50-58. Barron also ordered Richard and Deborah to pay Coffee Beanery $13,710 in unpaid royalties (which Coffee Beanery had not even requested in its counterclaim) and $187,452 in legal fees and arbitration expenses, including

$16,800 for the arbitrator's services, $35,571 for a court reporter and transcription, and $504 for the Beanery lawyers' lunches. *Id.* 57. The federal district court in Michigan confirmed the award and denied Richard and Deborah's motion to vacate. *Id.* 30-49

4. The Sixth Circuit's Decision. On appeal, Richard and Deborah raised four arguments in favor of vacatur: (1) that the Franchise Act claims fell outside the arbitrator's authority, (2) that the franchise agreement was unconscionable, (3) that the arbitrator had a conflict of interest that rose to the level of bias, and (4) that the arbitrator manifestly disregarded the law. App. 10.

In an unpublished and non-precedential decision, the Sixth Circuit reversed, concluding that the arbitrator manifestly disregarded the law because she "expressly chose not to follow clearly established law regarding the disclosure of Shaw's prior felony." *Id.* 14. The arbitrator, in other words, knew that Maryland law required disclosure of a felony conviction involving "misappropriation of property," but nevertheless refused to follow that law. The panel emphasized that the FAA "expresses a presumption that arbitration awards will be confirmed," and that the applicable standard is "one of the narrowest standards" in "all of American jurisprudence." *Id.* 7-8. In response to Coffee Beanery's petition for rehearing, the panel added a single paragraph discussing *Hall Street*, which the court interpreted as leaving open the possibility of review for manifest disregard of the law. App. 9.

Coffee Beanery again petitioned for rehearing en banc. No judge requested a vote on whether to rehear the case en banc, and the petition was denied. *Id.* 65. The Sixth Circuit has yet to issue a precedential decision concerning the availability of manifest-disregard review under section 10 of the FAA.

REASONS FOR DENYING THE WRIT

I. The Manifest-Disregard Standard Under Section 10 Of The FAA Has Been Settled Law For Decades.

In keeping with its uniform national policy in favor of arbitration, the FAA does not authorize ordinary judicial review of the legal merits of arbitration awards. On the contrary, the Act authorizes federal courts to set aside arbitration awards only under very limited circumstances, including when arbitrators have "exceeded their powers." 9 U.S.C. § 10(a)(4).

For half a century, the federal courts have exercised their authority under section 10 to review arbitration awards for manifest disregard of the law—that is, to determine whether an arbitrator has deliberately refused to follow what he or she knows to be the law. That extremely deferential standard had its genesis in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), which contrasted manifest disregard with ordinary judicial review of the merits: "[I]nterpretations of the law by the arbitrators *in contrast to manifest disregard* [of the law] are not subject, in the federal courts, to judicial review for error in interpretation" (emphasis added). This Court recognized the availability of the manifest-disregard standard in several subsequent decisions. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (listing manifest disregard of the law among the "very unusual circumstances" in which courts will set an arbitrator's decision aside); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 259 (1987); *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 601 (1985).

Although courts have often loosely referred to manifest disregard as a "nonstatutory" or "common law" basis for vacatur, the standard has historically been

viewed as an application of the "exceeded their powers" clause of Section 10(a)(4) because manifest disregard of the law is, by definition, one way in which an arbitrator exceeds his or her powers. *See Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 268-69 (7th Cir. 2006) ("[W]e have defined 'manifest disregard of the law' so narrowly that it fits comfortably under the first clause of the fourth statutory ground—'where the arbitrators exceeded their powers.'"); *Kyocera Corp. v. Prudential-Bache Trade Servs.*, 341 F.3d 987, 1002-03 (9th Cir. 2003) ("The 'exceeded their powers' clause of § 10(a)(4) . . . provides for vacatur only when arbitrators purport to exercise powers that the parties did not intend them to possess or otherwise display a manifest disregard of the law."); *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir. 1960) (first court of appeals decision applying the manifest-disregard standard; describing the standard as a gloss on the "exceeded their powers" clause).

The federal court of appeals—the First through Eleventh, D.C., and Federal Circuits—have unanimously adopted manifest disregard as a valid standard for vacating arbitration awards under the FAA.[2] Contrary to Cof-

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[2] *See Cytyc Corp. v. DEKA Prods. Ltd. P'ship*, 439 F.3d 27, 35 (1st Cir. 2006); *Hoeft v. MVL Group*, 343 F.3d 57, 69 (2d Cir. 2003); *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003); *Apex Plumbing Supply v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1998); *Sarofim v. Trust Co. of the West*, 440 F.3d 213, 216-17 (5th Cir. 2006); *Solvay Pharms. v. Duramed Pharm.*, 442 F.3d 471, 475 n.3 (6th Cir. 2006); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253 (7th Cir. 1992); *McGrann v. First Albany Corp.*, 424 F.3d 743, 749 (8th Cir. 2005); *Carter v. Health Net of Cal.*, 374 F.3d 830, 838 (9th Cir. 2004); *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1274 (10th Cir. 2005); *Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 431 F.3d 1320, 1326 (11th Cir.

(Footnote continued...)

fee Beanery's assertion, no circuit has categorically foreclosed the standard as an application of section 10(a)(4), which should be unsurprising given *Hall Street*'s discussion of manifest disregard.

II. *Hall Street* Did Not Foreclose Review For Manifest Disregard Under Section 10.

Last year, in *Hall Street*, this Court held that federal courts lack authority to vacate arbitration awards under the FAA for reasons other than those enumerated in the statute. *Hall Street*, 128 S. Ct. at 1400 ("We hold that the statutory grounds are exclusive."). The parties in *Hall Street* had agreed by contract to give the district court authority to vacate or modify their arbitration award for insufficient evidence or for ordinary legal errors—grounds not listed in the FAA. *Id.* The question for the Court was whether that aspect of the agreement could be enforced.

In *Hall*, one of the petitioner's arguments in favor of expanded review by contract was that "expandable judicial review authority has been accepted as the law since *Wilko*." *Id.* at 1403. The petitioner read *Wilko* as "recognizing 'manifest disregard of the law' as *a further ground for vacatur on top of those listed in § 10*." *Id.* at 1403 (emphasis added). If courts can add grounds for vacatur, the petitioner argued, then so can contracting parties.

This Court accepted neither the petitioner's argument nor its premise that manifest disregard is untethered to the statute—the same premise on which

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(...continued)
2005); *Kurke v. Oscar Gruss & Son, Inc.*, 454 F.3d 350, 354 (D.C. Cir. 2006); *Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d 1362, 1365-66 (Fed. Cir. 2001).

Coffee Beanery's petition rests. First, the Court observed that *Wilko*'s reference to manifest disregard "expressly rejects . . . general review for an arbitrator's legal errors." *Id.* at 1404. Second, the Court explained that manifest disregard may properly be viewed not as an additional, nonstatutory ground but as shorthand for those grounds enumerated in section 10. Manifest disregard may refer "to § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, 'manifest disregard' may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers.'" *Id.* at 1404 (citing *Kyocera*, 341 F.3d at 997). In other words, the Court recognized that review for manifest disregard of the law may be consistent with Section 10.

Tellingly, Coffee Beanery's petition completely omits *Hall Street*'s recognition that the manifest-disregard standard may properly be regarded as a gloss on Section 10 and its "exceeded their powers" clause. That recognition is fatal to the petition's argument (at 24-27) that the manifest-disregard standard is in "substantial tension" with *Hall Street*. To the contrary, the most that can be said for Coffee Beanery's argument is that *Hall Street* left the manifest-disregard standard open to further development in the circuits. As discussed below, however, no federal circuit since *Hall Street* has adopted the position that Coffee Beanery favors and, hence, there is no circuit split.

III. There Is No Circuit Split Over Manifest Disregard.

The petition contends that there is a "deep, post-*Hall Street* split in the circuits over whether manifest disregard of the law survives in any form as a ground for

vacating arbitration awards under the FAA." Pet. 3. But since *Hall Street* was decided, every reported court of appeals decision to squarely address the issue has held—consistent with *Hall Street*—that the FAA's statutory grounds are the exclusive grounds for vacating an arbitration award. And no circuit has held that the manifest-disregard standard, as an application of Section 10 of the FAA, does not survive *Hall Street*. In short, there is no circuit split (much less a "deep" one).

1. In the 16 months since *Hall Street*, only two circuits have produced precedent squarely addressing whether the manifest-disregard standard survives as an application of the FAA's enumerated grounds for vacatur. As the petition acknowledges (Pet. 4, 20-21) both of those circuits—the Second and the Ninth—have held that manifest-disregard survives as a gloss on Section 10(a)(4), just as this Court suggested in *Hall Street*. *See Arbitration Between Bosack v. Soward*, ___ F.3d ___, 2009 WL 2182898, at *3 (9th Cir. 2009); *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1281 (9th Cir. 2009); *Stolt-Nielsen SA v. Animalfeeds Int'l*, 548 F.3d 85, 95 (2d Cir. 2008).[3] That approach is consistent with the pre-*Hall Street* precedent in the Seventh and Ninth Circuits, which had both already held that an appropriately narrow manifest-disregard standard "fits

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[3] On June 15, 2009, this Court granted certiorari in *Stolt-Nielsen* (No. 08-1198). As Coffee Beanery acknowledges, the petition in *Stolt* did not present a question about the manifest-disregard standard's continued vitality; it sought review "only of an unrelated question regarding class arbitration." Pet. 33. Accordingly, there is no reason to hold this case for *Stolt*.

A petition for certiorari concerning whether manifest disregard is a valid standard for vacatur is also pending in *Comedy Club* (No. 08-1525). The petition in that case should be denied for the same reasons as the petition here.

comfortably" within Section 10(a)(4)'s "exceeded their powers" clause. *Wise*, 450 F.3d at 268; *accord Kyocera*, 341 F.3d at 997. No circuit has disagreed.

The petition's claim of a post-*Hall Street* conflict depends entirely on its assertion (at 17-18) that two circuits—the First and Fifth—have broken ranks with the others and held that "manifest disregard of the law is no longer a valid ground under the FAA for vacating an arbitration award." In fact, neither circuit has decided whether the manifest-disregard standard is impermissible as an application of Section 10(a)(4).

The petition's only support for its characterization of the First Circuit's position is one sentence of unexplained dictum in an opinion that expressly "decline[d] to reach the question of whether *Hall Street* precludes a manifest disregard inquiry" because the case was not governed by the FAA. *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008).

Worse still, the petition omits a later First Circuit decision vacating an arbitration award for manifest disregard of the law in a case brought under the FAA. *Kashner Davidson Securities Corp. v. Mscisz*, 531 F.3d 68 (1st Cir. 2008). Although it does not address *Hall Street* and echoes pre-*Hall Street* descriptions of manifest disregard as a "common law" standard, *Kashner* also observes that manifest disregard and the FAA's "exceeded their powers" clause may "overlap," *id.* at 77 n.7, and explicitly relies on the Seventh Circuit's narrow articulation of the standard, which is limited by the text of Section 10(a)(4). *Id.* at 77 (citing *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577 (7th Cir. 2001)). *Kashner* gives no indication that the First Circuit, when it eventually decides the issue, will reject the other circuits' thus-far uniform understanding of manifest disre-

gard's statutory basis. Because the First Circuit continues to recognize the validity of the manifest-disregard standard, and because it has yet to weigh in on *Hall Street*'s impact, its precedent does not support Coffee Beanery's claim of a circuit split.

The Fifth Circuit's approach in *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009), is likewise consistent with that of the Second, Seventh, and Ninth Circuits. *Citigroup*'s holding is carefully limited to whether manifest disregard survives as an independent, *nonstatutory* ground for vacatur. Consistent with *Hall Street*, *Citigroup* holds that "*to the extent that* manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the FAA." *Id.* at 355 (emphasis added).

Citigroup expressly did not decide whether the manifest-disregard standard survives as an application of the grounds specified by Section 10 of the FAA. Instead, it remanded to the district court to determine "whether the grounds asserted for vacating the award might support vacatur under any of the statutory grounds"—a step that would have been unnecessary if the court were foreclosing review altogether. *Id.* at 358. On remand, Citigroup renewed its motion to vacate the arbitration award, urging the district court to reassess its manifest-disregard argument under the standard articulated by the Second and Ninth Circuits.[4] That motion is now pending before the United States District Court for the Southern District of Texas.

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[4] *See* Amended Brief in Support of Motion of Citigroup Global Markets, Inc. to Vacate Arbitration Award, Doc. 45, in *Citigroup Global Markets, Inc. v. Bacon*, No. 05-03849 (S.D. Tex).

Although it left the issue open, *Citigroup* recognizes that the Second, Seventh, and Ninth Circuits may be correct that manifest-disregard is permissible as an application of Section 10(a)(4), and that such an approach is consistent with *Hall Street*:

> [M]anifest disregard—as the [Second Circuit in *Stolt-Nielsen*] describes it—does not add to the statutory grounds. The court simply folds manifest disregard into § 10(a)(4). In the full context of the Second Circuit's reasoning, this analysis is not inconsistent with *Hall Street*'s speculation that manifest disregard may, among other things, 'have been shorthand for § 10(a)(3) or § 10(a)(4).'

Id. at 357 (quoting *Hall Street* and citing Second, Seventh, and Ninth Circuit decisions). *Citigroup* goes on to emphasize that this manifest-disregard standard, as limited by Section 10(a)(4), is "very narrow. Because the arbitrator is fully aware of the controlling principle of law and yet does not apply it, he flouts the law in such a manner as to exceed the powers bestowed upon him." *Id.* As some observers have noted, *Citigroup* "suggests that the substance of the doctrine may remain alive in the Fifth Circuit as a component of Section 10(a)(4) of the FAA," just as it does in the circuits that have already decided the issue.[5]

2. In an effort to make the case for a split, Coffee Beanery also overstates dicta in various circuits' post-

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[5]James E. Berger and Charlene Sun, *Fifth Circuit Addresses 'Manifest Disregard' Review Under Federal Arbitration Act*, Paul Hastings, *available at* http://www.paulhastings.com/assets/publications/1265.pdf?wt.mc_ID=1265.pdf.

Hall Street decisions. For example, the petition contends that the Fourth Circuit "implicitly" decided the question presented here in *Qorvis Communications, LLC v. Wilson*, 549 F.3d 303 (4th Cir. 2008). But *Qorvis* merely rejected out of hand the argument that an arbitrator had "manifestly disregarded the law of damages." *Id.* at 311. Because the argument that the arbitrator had manifestly disregarded the law rested on a misunderstanding of the arbitrator's decision, the court did not (and did not need to) discuss the manifest-disregard standard. *Id.*

The petition similarly mischaracterizes the position of the Sixth Circuit, which also has yet to produce a precedent on point. Because the Sixth Circuit decision in this case is unpublished, the petition points to *Dealer Computer Services, Inc. v. Dub Herring Ford*, 547 F.3d 558 (6th Cir. 2008). But that case held that jurisdiction was lacking because the award was not ripe for review. Only a scrap of dictum in a footnote mentions manifest disregard, and even that footnote appears to appropriately contrast vacatur on "non-statutory grounds" with *Hall Street*'s holding. *Id.* at 561 n.2.

More significantly, the petition fails to mention a subsequent Sixth Circuit decision making clear that that, "under *Hall Street*, 'the enumerated grounds in §§ 10 and 11 provide the 'exclusive' grounds for obtaining relief from an arbitration decision." *Grain v. Trinity Health, Mercy Health Services Inc.*, 551 F.3d 374, 379 (6th Cir. 2008); *see Augusta Capital, LLC v. Reich & Binstock, LLP*, 2009 WL 2065555, at * 4 (M.D. Tenn. 2009) (citing *Grain* for that proposition). *Grain* observes that this Court's holding in *Hall Street* casts "doubt on the continuing vitality of [the] theory" that manifest disregard survives as a "'judicially created' supplement to the enumerated forms of FAA relief," and notes *Hall Street*'s recognition that manifest disregard may be un-

derstood as "shorthand" for Section 10. 551 F.3d at 379-80. Nevertheless, *Grain* did not concern a motion for vacatur, but rather a request for modification under 9 U.S.C. § 11, which does not include the "exceeded their powers" language. *Grain* therefore did not decide the question presented for the Sixth Circuit. *See also Martin Marietta Materials, Inc. v. Bank of Oklahoma*, 304 Fed. Appx. 360, 362 (6th Cir. 2008) (assuming, without deciding, that the manifest-disregard standard survives *Hall Street*).[6]

3. In the absence of a circuit split over the questions presented, Coffee Beanery conjures up another circuit split. It claims that the Second, Seventh, and Ninth Circuits have each "adopted a different rule of what manifest disregard includes, creating further conflict in the law." Pet. 20. Because the petition does not present a question concerning the substance of the manifest-disregard standard (as opposed to its availability as a categorical matter), this additional alleged conflict provides no justification for certiorari here.

In any event, the conflict over the standard's scope is nonexistent. The Second, Seventh, and Ninth Circuits all reject the notion that the manifest-disregard standard encompasses judicial review for mere legal errors. *See Bosack*, ___ F.3d ___, 2009 WL 2182898, *4 (explaining that manifest disregard requires much more than "mere error in the law or failure on the part of the arbitrators to understand and apply the law"; it requires that

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[6] The losing party in *Grain* filed a petition for certiorari (No. 08-1446), currently pending before this Court, raising the question whether an arbitration award may be modified (as opposed to vacated) based on the manifest-disregard standard. As the brief in opposition in *Grain* explains, there is no circuit split on that question either. *See* BIO in *Grain v. Trinity Health* (No. 08-1446), at 30-33.

an arbitrator was aware of the law and "intentionally disregarded" it); *Stolt-Nielsen*, 548 F.3d at 95 (adopting Seventh Circuit's admonition that manifest-disregard does not entail "judicial review of the arbitrator's decisions"); *Watts*, 248 F.3d at 579 ("If the parties specify that their dispute is to be resolved under Wisconsin law, then an arbitrator's declaration that he prefers New York law, or no law at all, would violate the terms on which the dispute was given to him for resolution, and thus justify relief").

IV. The Petition's Predictions About The Impact Of Allowing Review For Manifest Disregard Are Overblown.

Coffee Beanery contends that leaving in place limited review of arbitration awards for manifest disregard of the law—a standard that federal courts have been applying for half a century—will have "sweeping national consequences" and threaten the "continued vitality of arbitration." Pet. 28. But it is Coffee Beanery that is seeking a sweeping change, one that has not been adopted by a single circuit. At the very least, given the need for stability and certainty in the arbitration process, the untested nature of Coffee Beanery's preferred approach counsels strongly in favor of allowing the issue to percolate .

If Coffee Beanery is correct, then Congress has stood silently by for 50 years as every federal circuit has radically misinterpreted the FAA. Such "prolonged congressional silence in response to a settled interpretation of a federal statute provides powerful support for maintaining the status quo." *Hibbs v. Winn*, 542 U.S. 88, 112 (2004) (Stevens, J., concurring); *see also Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 594 (2004). Congress's half century of silence "can be likened to the dog that did

not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991).

The petition, moreover, assumes that the manifest-disregard standard, even when properly limited as a gloss on Section 10(a)(4), allows "judicial review for legal errors." Pet. 28. But it is has been clear at least since *Wilko* that such review is impermissible. And it is even clearer after *Hall Street*, which explains that the FAA reflects a "national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straigtaway." 128 S. Ct. at 1405 (warning against opening the door to "full-bore legal and evidentiary appeals"). As discussed above, the circuits that have addressed the issue since *Hall Street* have all been emphatic that manifest-disregard under Section 10(a)(4) cannot encompass mere legal error. The petition approvingly quotes Judge Posner's remarks in *Wise*, 450 F.3d at 269, concerning the need to avoid ordinary judicial review of arbitration awards. But *Wise* itself recognizes the validity of manifest disregard of the law as an application of Section 10(a)(4). *Id.* at 268-69. And the Second Circuit's conclusion that manifest-disregard can be appropriate applied under Section 10(a)(4) relied heavily on *Wise*, including the same passage quoted in the petition. *See Stolt-Nielsen*, 548 F.3d at 95.

Despite the petition's dire predictions about the potential for merits-based review, Coffee Beanery cannot deny that federal-court vacatur of an arbitration award for manifest disregard is extraordinarily rare, having occurred in only a handful of reporting federal decisions in the more than 50 years the doctrine has been applied by the courts. The rarity of vacatur underscores the lack of importance of the questions presented.

The petition suggests that the mere availability of the manifest-disregard standard encourages losing parties to challenge arbitral awards, even where doing so is frivolous. Coffee Beanery's solution to this perceived problem is to cut off this avenue of review altogether. The only authority the petition cites for the argument that frivolous challenges are becoming a problem is *B.L. Harbert Int'l v. Hercules Steel Co.*, 441 F.3d 905, 913 (11th Cir. 2006), which discussed what to do "[w]hen a party who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief that it prevail[.]" *Id.* But *Harbert* does not say such frivolous claims are any more common than other kinds of frivolous claims. More importantly, *Harbert* proposes a very different solution than does petitioner—namely, "insist[ing] that if a party on the short end of an arbitration award attacks that award in court without any real legal basis for doing so, that party should pay sanctions." *Id.* The availability of such ordinary remedies for abusive litigation underscores the lack of any need for this Court's review.

Moreover, while the Eleventh Circuit's threat of sanctions may be severe, it is far less extreme than the approach proposed by the petition. Coffee Beanery's position, if accepted, would eliminate any safety valve for the rare case in which an arbitrator truly strays beyond the bounds of his or her authority. The presence of such a safety value bolsters the integrity of, and public confidence in, the alternative dispute resolution process as a whole.

Such a safety valve is also particularly important in cases such as this one, in which there is a risk that, absent any possibility of review, statutory rights will be devalued. Thus, in *Gilmer v. Interstate/Johnson Lane*

Corp., 500 U.S. 20 (1991), this Court held that cases involving statutory rights are subject to arbitration, but rested that conclusion on two fundamental assumptions about how arbitration would operate in such cases. First, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Id.* at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Second, "'although judicial scrutiny of arbitration awards necessarily is limited, *such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue.*" *Id.* at 32 n.4 (quoting *Shearson/American Express v. McMahon*, 482 U.S. at 232) (emphasis added)).

As the courts of appeals have recognized, "[t]hese twin assumptions regarding the arbitration of statutory claims are valid only if judicial review under the 'manifest disregard of the law' standard is sufficiently rigorous" to ensure that arbitrators do not exceed their authority under a given statute. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1487 (D.C. Cir. 1997); *see also Williams v. Cigna Fin. Advisors*, 197 F.3d 752, 761 (5th Cir. 1999) ("The federal courts and courts of appeals are charged with the obligation to exercise sufficient judicial scrutiny to ensure that arbitrators comply with their duties and the requirements of the statutes."). By proposing to discard the manifest-disregard standard, petitioner seeks to eliminate a fundamental protection on which the arbitrability of statutory claims is premised.

Petitioner's attempt to discard the manifest-disregard standard would overturn the law of every circuit and call into question the settled expectation that statutory claims are subject to mandatory arbitration. An established consensus in the lower courts, supported

by statements of this Court, should not be overturned merely because a litigant is dissatisfied with the application of the law to the facts of its case.

V. This Case Is A Poor Vehicle For Exploring The Questions Presented.

Even apart from the complete absence of a circuit split on the first question presented, this case is a poor vehicle for exploring whether the manifest-disregard standard is valid in any form.

At the very least, this Court should await a case in which the court below has thoroughly analyzed, and created precedent, on the question presented. The decision below has little discussion of the statutory basis for the manifest-disregard standard, and the panel did not have the benefit of the more thorough analysis in cases such as *Stolt-Nielsen*, *Comedy Club*, and *Citigroup*. *See Citigroup*, 562 F.3d at 356 (noting that "*Coffee Beanery* only briefly considered the effect of *Hall Street* on manifest disregard of the law."). Moreover, the decision below is unpublished and the Sixth Circuit has yet to provide a definitive answer concerning the availability of manifest-disregard review under Section 10(a)(4). The Court should also wait until at least one circuit has adopted Coffee Beanery's theory. In the absence of such a decision, review would not only be premature and unnecessary, but unfocused and without the benefits of a full airing in the lower courts.

This case is also poor vehicle because it involves several alternative, factbound grounds for vacatur. The petition contends that this case is an acceptable vehicle because "[t]he arbitrator here did not resolve a claim outside the scope of the agreement"—an action that "all Circuits would agree would exceed the arbitrators powers under § 10(a)(4) of the FAA." Pet. 32-33. But, in fact,

respondents' principal argument below was that "the Arbitrator overreached her authority when she ruled on the Franchise Act claims," despite a contract provision providing otherwise. App. 32. Respondents also argued that "the Arbitrator had a conflict of interest that rose to the level of bias"—namely, that she shared an accountant with Coffee Beanery, and issued an award that critically depended on her assessment of the credibility of that accountant. *Id.*; 9 U.S.C. § 10(a)(2) (authorizing vactur for "evident partiality"). The existence of compelling alternative grounds for vacatur makes it likely that review of the Sixth Circuit's formulation of the manifest-disregard standard would not be dispositive.

Finally, to the extent that the petition seeks to take the Sixth Circuit to task solely for its description of the proper basis for the manifest-disregard standard (statutory versus non-statutory), that request is a purely academic exercise unworthy of this Court's review. This Court does not sit to police dicta in unpublished decisions. Likely for this reason, the petition also includes a second question presented, seeking review of the case-specific application of the manifest-disregard standard to the facts. Pet. ii. But certiorari is inappropriate where, as here, the asserted error consists of no more than "the misapplication of a properly stated rule of law." S. Ct. Rule 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 2009